



1244371 - R8 SDMS

COMMENTS ON PROPOSED CONSENT DECREE  
FOR  
EAST HELENA PROCESS PONDS OPERABLE SUBUNIT

INTRODUCTION

The following comments represent Asarco's paragraph-by-paragraph response to EPA's proposed consent decree for the Process Ponds Operable Subunit at the East Helena Site. This response incorporates by reference the issues identified in Asarco's letter to EPA dated April 12, 1990, and discussed at the meeting with EPA and Anaconda on April 18, 1990. A revised consent decree for the Process Ponds Operable Subunit is included and more completely incorporates Asarco's comments on EPA's proposed consent decree.

**Page 1**

Paragraph 1: Defendants are properly identified as ASARCO Incorporated ("Asarco") and Anaconda.

Paragraph 2: The Site is listed on the National Priorities List ("NPL") as the "East Helena Site", not as the "East Helena Smelter Site". All references to the Site should be consistent with the listing as it appears on the NPL.

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Paragraph 2: EPA's jurisdiction is predicated only on the release or threatened release of hazardous substances from the Site. The provisions of the attached consent decree are consistent with this jurisdictional requirement. Much of the proposed decree goes beyond what is required to establish jurisdiction.

Paragraph 3: Technically, the term "smelting" in this paragraph should be replaced with the term "fuming".

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Paragraph 2: Pursuant to section 122(d)(1)(A) of CERCLA, no finding by EPA of an imminent and substantial endangerment to public health or the environment is necessary in order to enter into a consent decree. Asarco does not admit or acknowledge that the release or threatened release constitutes an imminent and

substantial endangerment to the public health or the environment and EPA need not make such a finding in this consent decree.

Paragraph 6: According to the language of paragraph 6, the decree will resolve the issue of Defendants' past response costs. It should be clear that the decree resolves all issues of all of Asarco's past response costs for all operable units at the Site, not just the Process Ponds Operable Subunit. In addition, it should also be clear that this decree involves the selected remedy for only the process ponds subunit. The process circuit operable subunit will be addressed in the comprehensive Site remediation plan.

## **Section II, Parties Bound**

Part A, page 5: The Defendants should be bound only by the authority and on behalf of the respective individual Defendant. In addition, this decree should be binding on the officers, employees, directors and agents only in their representative capacities.

Part C, page 6: Asarco objects to the provision which requires it to complete all remedial activities in the event Anaconda becomes insolvent or otherwise unable to pay for its share. It should be clear that Anaconda is not free to simply remove itself from the proces and thereby avoid any and all financial responsibility for remediation of the Site. Therefore, the initiation of formal bankruptcy proceedings should be required prior to shifting all obligations to one Defendant.

## **Section III, Definitions**

Paragraph B, page 7: The definition for "day" should be a business day, not calendar day.

Paragraph E, page 7: The NCP should be defined as the regulations at 40 C.F.R. Part 300 and in effect as of the effective date of the decree.

Paragraph J, page 8: The remediation levels or prescribed standards should be limited to those specified in the ROD. This is consistent with the revised NCP which was effective April 9, 1990.

Paragraph K, page 9: The definition of the "Site" has been revised to conform to the actual listing on the NPL in September, 1984. The definition of "on-site" has been changed consistent with the definition contained in the revised NCP.

#### **Section IV, General Provisions**

Paragraph C, page 10: Asarco should not be required to attain any additional or more stringent ARARS should ARARS "change" during the course of the Work. According to the revised NCP, ARARS are to be frozen at the time the ROD is signed to prevent disrupting remedial activities.

Paragraph D, page 10: Part D is duplicative of the requirement set out in Part C that the Defendants perform all activities in accordance with the required ARARS and has therefore been deleted.

Paragraph E, page 11: This provision fails to specify which response costs Asarco agrees to reimburse the United States. The revised decree specifies that Defendants agree to reimburse EPA for costs incurred related to oversight activities.

#### **Section V, Performance of Work**

Paragraph A, page 11: Asarco has already expended a substantial amount of time and resources to perform certain remedial activities at the Site and EPA should grant Asarco express written approval of these activities. This latter concern is addressed in Paragraph D of this section in the attached consent decree.

Paragraph B, page 11: Paragraph B has been revised to allow the defendants to submit more than one revised report if notified by EPA of any deficiencies or required modifications because Defendants should not be required to automatically incorporate all comments supplied by the Agency. In addition, past experience has indicated meetings to discuss potential revisions are necessary to adequately finalize reports and plans. Further, there may be situations where changes required by EPA will necessitate additional changes to ensure consistency, thus precluding the Defendants' ability to make the certification as required under the terms of the proposed decree. The attached consent decree addresses these concerns. In particular, the attached consent decree allows the continuation of the working relationship established between Asarco and EPA throughout the CERCLA process thus far.

Paragraph C, page 12: The stipulated penalty provision is inappropriate and has been deleted.

## **Section VI, Compliance with Federal and State Requirements**

Paragraph A, page 14: EPA guidance is not legally binding, and therefore compliance with EPA guidance should not be required by the decree. Also, the Defendants should not be held responsible for identifying or using other guidelines, policies, procedures, or information that may be "appropriate" for performing Work under the decree. All such guidelines, policies, procedures, or information should be specifically set forth in the ROD and the Work Plan.

Paragraph B, page 15: Activities undertaken by Defendants must comply only with applicable laws and regulations. All Work pursuant to the decree will be performed on-site; as a result, no permits will be required for the implementation of any Work. The attached decree eliminates the need to obtain permits for Work conducted pursuant to the decree.

Paragraph C, page 15: This provision is unnecessary and is omitted in the revised decree. As stated in the RI/FS, no historical resources, either state or federal, are impacted by the implementation of any remedial activity. As a result, neither consultation nor mitigation is required.

Paragraph D, pages 15-16: EPA should only be permitted to disapprove of contractors for reasonable and legitimate reasons and imposition of stipulated penalties for Defendants' failure to identify an "acceptable" contractor is inappropriate. EPA and the Defendants should work together to determine and identify a contractor who is acceptable and meets with EPA approval. In the event an acceptable contractor cannot be identified, the matter should be subject to the dispute resolution provisions.

Paragraph E, page 16: The provision which requires a full-time, on-site inspector has been deleted since it is duplicative of the required project coordinator.

## **Section VII, Reporting Requirements**

Paragraph A, subparagraph 1, page 17: Subpart 1 has been revised in the attached decree to reflect the filing of bi-monthly reports as opposed to monthly progress reports. Monthly reports are overly burdensome and unnecessary, particularly when daily and weekly reports are provided. Bi-monthly reports will adequately advise EPA of the progress at the Site.

Paragraph A, subparagraph 1(h), page 17: This provision requires the bi-monthly progress report include information regarding changes in personnel during the reporting period. It is not clear which personnel are impacted by this provision;



therefore, the revised consent decree requires notification of changes in the project coordinator or contractors.

Paragraph A, subparagraph 3, pages 18-19: Bi-monthly O and M reports are all that should be required, consistent with progress reports.

Paragraph D, pages 21-22: Asarco objects to the requirement that all reports submitted to EPA under the terms of the decree contain the proposed certification statement by a responsible corporate officer. The requirement is unnecessary and EPA is without authority to impose such a certification requirement; therefore, this paragraph has been deleted.

#### **Section IX, Site Access and Sampling**

Paragraph A, page 24: Access and entry to the site by the United States must at all times be reasonable and must be necessary to monitor the implementation of the Work performed pursuant to this decree.

Paragraph B, page 24: Asarco does not need to obtain access agreements, rights-of-way or easements for property not owned by the Defendants because all remedial activities required under the Work Plan and this decree will be performed on property owned by Asarco. The provisions in the revised decree requiring such actions have been deleted.

Paragraph D, page 25: Oversight activities must be limited to the Work performed under this decree.

Paragraph F, page 25: Five days is sufficient notice of sample collection activities.

Paragraph H, subparagraph 1, page 27: The requirement that the Defendants perform "periodic" audits of any laboratory which conducts analyses of samples taken under the decree is overly burdensome and unnecessary. An audit every five years to ensure that the laboratory utilizes proper techniques and procedures is sufficient. The requirement that the defendants report "serious deficiencies" to EPA is unclear; as a result, Asarco cannot be sure whether it has adequately complied with the decree's requirements.

**Section X, Documentation, Availability of Information and Record Retention**

Paragraphs A, B, C, D, E and F, pages 29-31: EPA cites no authority in support of the requirements that Asarco establish and maintain a central document control system or that it prepare and submit six-month inventories of the documents contained in the central document system. In the absence of any legal authority for such requirements, Asarco objects to these provisions and has deleted them from the revised decree.

Paragraph H, page 32: Asarco is willing to cooperate with EPA in disseminating relevant information to the public, but requires assurances that the confidentiality of their documents be maintained, and that no confidential business information be released.

**Section XI, Insurance**

Paragraph A, subparagraph 2, page 32: Asarco objects to the excessive amounts of liability insurance required by the decree. Such amounts may preclude Asarco from obtaining competent contractors and subcontractors to perform the Work under the decree. The revised decree contains insurance amounts that Asarco considers to be realistic. Further, a contractor may be acceptable to EPA despite its inability to obtain the necessary insurance; therefore, EPA should retain the right to grant its approval of such a contractor despite the absence of the required insurance.

Paragraph B, page 33: Asarco objects to the provision which grants EPA the right to increase the dollar amount of the insurance requirements and has deleted this provision from the revised decree.

**Section XII, Financial Assurance**

Paragraph A, page 34: Asarco objects to the imposition of a financial assurance requirement. Both Defendants are successful, financially secure corporations, capable of financing the remedial activities required under the terms of this decree. Therefore, this provision has been deleted.

**Section XII, Extension of Schedules**

This new section, contained in the revised decree, provides a practical and realistic solution to the obvious occasional need to extend the schedules set out in the ROD and Work Plan. Delays are inevitable, and those delays beyond the Defendants' control

should not subject them to the stipulated penalties provisions of this decree.

### **Section XIII, Reimbursement of Response Costs**

Paragraph B, page 35: Asarco proposes that EPA submit its accounting to the Defendants on a quarterly rather than an annual basis, to give Asarco an adequate opportunity to evaluate EPA's assessment of costs. It is Asarco's understanding that quarterly accounting is available to EPA. Further, the 30-day period in which Defendants are expected to reimburse EPA for response costs is inadequate.

Paragraph C, page 35: Asarco does not expressly or impliedly waive the right to request additional documentation from EPA regarding response costs.

Paragraph E, page 36: Asarco objects to the provision that requires the amount of any disputed cost assessment be deposited into an escrow account pending resolution. In addition, interest should not be permitted to accrue on costs which are the subject of dispute resolution. These provisions have been deleted.

Paragraph G, page 37: Interest on any unpaid costs should not begin to accrue until such payment amount is finally settled and due.

Paragraph H, page 38: Asarco does not waive any right to contest or seek return of or reimbursement for, costs reimbursed to EPA by Asarco.

### **Section XIV, Dispute Resolution**

Paragraph F, page 41: Asarco objects to judicial review being limited to the administrative record as well as to the standard of review being arbitrary and capricious. The statutory language contained in section 113 of CERCLA does not go as far as EPA proposes in this decree.

Asarco further objects to the placement of the burden of proof on it to demonstrate that EPA's position is arbitrary and capricious. This paragraph has been deleted.

### **Section XV, Stipulated Penalties**

Paragraph A, pages 41-42: The conditions under which stipulated penalties will not be assessed must be extended beyond those situations that constitute a force majeure. The stipulated penalties should only be applicable to those situations which

remain fully within the Defendants' ability to control. Thus, Defendants should not be subject to penalties when their failure to comply is attributable to dispute resolution proceedings. Also, the amounts of the stipulated penalties set forth in the decree are excessive, especially in light of Asarco's willingness to cooperate with EPA. Reasonable stipulated penalties would accrue in the amount of \$1,000 for the first seven days and if such delay extends beyond seven days, then the penalties should accrue in the amount of \$2,000 for each additional calendar day. Finally, the stipulated penalties should not be permitted to exceed a maximum daily penalty.

Paragraph D, page 43: The appropriateness of the stipulated penalties should not be decided solely on the administrative record; nor should EPA's decision be reviewable under the arbitrary and capricious standard.

Paragraph E, page 44: There is no statutory or regulatory authority for the assessment of interest, handling or penalty charges described in Paragraph E. EPA's authority is limited to the collection of civil penalties, and does not include the right to assess additional punitive penalties.

Paragraph 5: This paragraph is new and provides for EPA to elect stipulated penalties or to pursue other remedies under federal law. This language is from the Administrative Order on Consent, Docket No. CERCLA-VIII-89-10, between Asarco and EPA.

## **Section XVI, Force Majeure**

Paragraph A, page 45: Given the often harsh nature of weather conditions in the area of the Site, "normal inclement weather" in the area could prevent the Defendants from performing some remedial activities.

Paragraph B, page 45: Asarco requires more than 24 hours within which to notify the Project Coordinator of a force majeure condition. Force majeure situations could clearly arise in which the circumstances would not be known for more than 24 hours. If Asarco is not allowed 72 hours within which to give notice, the Defendants will be forced to unnecessarily give notice in order to protect its claim of force majeure. Failure to give notice should not waive Defendant's right to a claim of force majeure.

Page 46: Requiring review on the administrative record and an arbitrary and capricious standard is beyond EPA's authority and has been deleted.



**Section XVII, Restrictions on Conveyance**

Paragraph D, page 48: Asarco should not have to insure that any person acquiring title to property subject to this decree be bound to the decree. It is sufficient to require that any purchaser of such property agree to permit entry onto the property, and to not interfere with remedial activities.

Paragraph E, page 48: The parties to any transaction involving the real property subject to this decree should be able to contractually arrange for liabilities between the two parties. This paragraph has been deleted.

**Section XVIII, Admissibility of Data**

Paragraph A, page 49: Asarco should be allowed more time to evaluate any data and determine the nature and extent of any evidentiary objections to the data. Sixty days is appropriate. Asarco will only waive any evidentiary objection as to the data's accuracy and authenticity.

Paragraph B, page 49: Asarco will not waive any objections to these data. Asarco should be given the opportunity to review the QA/QC procedures.

Paragraph C, page 49: Admissibility of data collected on the RI/FS is covered under the Administrative Order on Consent, Docket No. CERCLA VIII-89-10, entered into by Asarco and EPA. This paragraph has been deleted.

**Section XIX, Indemnification**

Paragraph A, page 50: Asarco objects to the provision under which the United States shall not be liable for injury or damages to persons or property. In addition, the decree should contain a provision under which the United States agrees to hold harmless and indemnify the Defendants from all claims which arise from the acts or omissions of the United States, its agents, contractors, consultants, and employees in carrying out the work required by or undertaken pursuant to any provision of this decree.

**Section XX, Five-Year Review**

Paragraph B, page 51: If EPA determines based on the five-year review that further action is appropriate, it may take or require that action. The revised decree has been changed to be consistent with the language in CERCLA, section 121.

**Section XXI, Modifications to decree**

Paragraph C, page 52: In the event an amendment to the ROD is required and EPA orders the Defendants to halt or modify Work under the decree, Defendants should be granted an extension or schedule change for any Work subject to such an order. In addition, any decision by EPA that an amendment to the ROD is warranted should be subject to the dispute resolution provisions of the decree.

**Section XXII, Failure to Meet Remediation Levels**

Paragraph E, page 54: This provision should be subject to the dispute resolution provisions of the decree.

Paragraph F, pages 54-55: In the event Asarco proposes an amendment or modification to the Work Plan, EPA should be permitted to exercise its discretion to stay the accrual of stipulated penalties for any delay resulting from the amendment or modification or EPA's consideration and evaluation of the amendment or modification. Further, EPA's consideration of, determination concerning, or failure to make a determination concerning the proposal should be subject to the dispute resolution provisions of this decree.

**Section XXV, Certification of Completion**

Page 57: The requirement that the written report be prepared by a registered professional engineer is unnecessary. EPA will have been supplied innumerable reports detailing the progress of the remedial activities at the Site over the course of the remediation. Further, no justification exists for requiring that the final report be certified by a professional engineer. In addition, having received notice of completion, EPA should respond within 90 days.

**Section XXVII, Effect of Settlement**

Paragraph A, page 59: As discussed previously, Asarco objects to the application of the provisions of section 113(j) of CERCLA, 42 U.S.C. section 9613(j), to matters arising under the terms of this decree.

Paragraphs J and L, page 61: These paragraphs have been deleted since they are duplicative of other provisions in the decree.

**Section XXIX, Covenant not to Sue**

Paragraphs A - H: Asarco has included in the revised decree a section containing the necessary provisions of a covenant not to sue.